BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LOMA JUNE MARVIN	)	
Claimant	)	
	)	
VS.	)	
	)	
BOB BERGKAMP CONSTRUCTION CO., INC.	)	
	)	
Respondent	)	Docket No. 1,026,708
	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE CO.	)	
	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the June 23, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that it was more probably true than not true that claimant was injured while working for respondent and that her injury arose out of and in the course of her employment. The ALJ, however, found that claimant failed to prove by a preponderance of the credible evidence that she gave notice within ten days to respondent. Accordingly, claimant's request for benefits was denied.

Claimant contends the ALJ erred in finding that she failed to prove that she gave notice to respondent within ten days and claims that she is entitled to workers compensation benefits.

Respondent and its insurance carrier (respondent) assert that the ALJ correctly denied benefits on the basis that claimant failed to provide timely notice of her alleged work-related injury. Respondent, therefore, requests that the ALJ's Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant had worked as a truck driver for respondent since January 1999 when, in March or April 2004, she noticed her left thumb was locked down. She attributed this to holding the steering wheel of the truck to keep it on the road. She reported her left thumb condition to Kenny Colvard, her supervisor, and Roy Pulliam, respondent's safety director. Neither Mr. Colvard nor Mr. Pulliam asked her to fill out an accident report or see a particular doctor. Claimant then, on her own, went to Dr. Lynette Jacobson, who referred her to Dr. Robert Eyster. She first saw Dr. Eyster in the latter part of 2004, at which time she also began having trouble with her right thumb. She had right trigger thumb release surgery performed by Dr. Eyster on October 12, 2004. Dr. Eyster did not diagnose her with carpal tunnel syndrome in either hand, according to claimant. She returned to her regular employment after that surgery with no restrictions.

Claimant's left thumb continued to be locked down, plus she developed total numbness in the right thumb and some numbness in both hands. Claimant was unhappy with the results of the surgery on her right thumb and went to her personal physician, Dr. Stevens. Eventually she was referred to Dr. James Gluck. She first saw Dr. Gluck in August 2005. Dr. Gluck had some tests performed on claimant and diagnosed her with mild to moderate bilateral carpal tunnel syndrome and trigger thumb. He performed left thumb trigger release and left carpal tunnel release on September 2, 2005. Claimant missed two or three weeks of work because of this surgery. She gave her off-work slip to both Mr. Colvard and Mr. Pulliam. She testified that at that time, she told Mr. Colvard that her problems were being caused by holding the steering wheel on the truck she was driving and keeping a hand on the shifter to keep it from popping out of gear.

On November 29, 2005, Dr. Gluck performed right carpal tunnel release. On November 28, 2005, claimant gave her off-work slip to Rick Thome, the project manager of the job she was working on. She did not remember if she told him she developed the problem because of the difficulties she was having driving her truck. Because claimant gave the doctor's release to Mr. Thome instead of to the proper foreman, her employment was terminated by respondent.

Claimant testified that "on numerous occasions"[1] she told her employer that the problems she was having with her hand were caused by her truck driving. Claimant testified that before both her October 2004 and September 2005 surgeries, she advised Mr. Colvard and Mr. Pulliam that the surgeries were due to work-related activities. She told them she was having problems holding the steering wheel of the truck. Before her

[1] P.H. Trans. (Mar. 16, 2006) at 36.

November 2005 surgery, she did not talk to either Mr. Colvard or Mr. Pulliam, but only gave Mr. Thome her off-work release. However, she said she called Mr. Colvard the morning of her surgery.

In 2000, claimant had filed a workers compensation claim for an injury to her right index finger. She admitted she remembered that her employer's prior insurance carrier dictated which doctor she was to see for her injury. She did not remember the details of reporting that injury to her employer. Claimant admitted that in the current claim, she never requested temporary total disability compensation for the time she was off work for her surgeries until after she filed her workers compensation claim. She never asked respondent to pay for any of her medical bills over the two-year period she was being treated for her hands and thumbs. She never asked respondent to refer her to a doctor. She admitted she knew respondent was supposed to pay for her medical bills for work-related injuries.

Roy Pulliam is the truck superintendent at respondent and was claimant's supervisor. He first knew that claimant was being treated for her hands in 2004 when she took off work. When he asked her what the problem was, she showed him her thumb. He testified that when he asked claimant whether something at work caused it, she told him that it was just something that happens and that she was going to see her doctor. He said claimant did not give any indication that the condition was work related.

Mr. Pulliam has worked for respondent for 17 years and during that time has had a lot of employees come to him with work-related injuries. He admitted that he had never seen a trigger thumb before, nor had he experienced an employee with a claim of carpal tunnel syndrome. At that time, he was not familiar with the causes of those types of problems. He does not recall ever filling out an accident report dealing with overuse or repetitive trauma.

Mr. Pulliam said the first step after being notified of an injury was to take the injured employee to be treated. During the treatment, a urinalysis would be performed. Mr. Pulliam would make a first report to the office manager, who would inform the insurance carrier.

Mr. Pulliam did not remember specifically asking claimant in September 2005 whether her condition was related to work. However, he specifically remembers asking her that question before September 2005. He remembered speaking with her after her surgery in September 2005, when she told him that she was still having problems and was going to have more surgery. Claimant told him that she was going to wait and have the surgery in the winter when she was not so busy at work. Mr. Pulliam questioned her on this, suggesting that she get it taken care of "to prevent any further injury or any problem by the

company"[2] She replied that she had talked to her doctor, that there was not going to be any further injury, and that waiting until winter would be fine. Mr. Pulliam said claimant did not tell him during this conversation that holding the steering wheel while driving was giving her problems.

Mr. Pulliam confirmed that claimant did complain about the shifter in her truck. She did not say that the shifter was causing her problems with her hands, just that the shifter was not operating correctly. Although claimant stated that the problem with the shifter went on for about a year, Mr. Pulliam denied any truck had a problem for that length of time before it was repaired.

Kenny Colvard testified that he was transportation foreman at respondent and was claimant's supervisor. He testified that he did not know claimant was receiving treatment for her hands until she came to him just before her surgery in October 2004. Mr. Colvard indicated that claimant said she was having surgery but that it was not job related. He never had a conversation with claimant about whether her job was causing problems with her hands. He had no specific memory of talking to her about her truck's shifter popping out of gear but was sure she told him because he had the truck fixed. Claimant never complained to him about problems with her hand while trying to hold the shifter in place.

K.S.A. 44-520 requires injured workers to give notice of work related accidents within ten days. Under certain circumstances, this may be extended to 75 days. Although the ALJ made the finding that claimant failed to prove she gave notice within ten days to respondent, the ALJ did not make any findings of date or dates of accident or when the ten days began to run. Claimant alleges a series of repetitive traumas from her usual work duties, including, for a time, from a defective shifter or transmission problem, through November 28, 2005, her last day worked. Claimant contends she gave notice on numerous occasions while working for respondent. However, respondent denies this and asserts that the written claim received from claimant's counsel on December 19, 2005, was its first notice that claimant was alleging her injuries were work related. Respondent further contends that "[p]ursuant to *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220 (1994), and its progeny, October 12, 2004 is the date of accident for this claim, as it was the first date claimant missed work as a result of her alleged injury."[3]

The Board does not interpret *Berry* and its progeny to say that the date of accident for a repetitive use accident or series of traumas is the first day the injured worker misses work due to the accident. Rather, it is the last. *Treaster*[4] reaffirmed this last day worked rule first announced in *Berry*, except when the worker's job duties are changed to

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[2] *Id.* at 52.

[3] Respondent and Insurance Carrier's Brief on Appeal (filed July 27, 2006) at 2.

[4] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

accommodate restrictions and/or terminate the offending activity. No such modification or accommodation was made in this case. Instead, claimant continued to perform her regular job duties until she was terminated on November 28, 2005. It cannot be said that claimant's termination was unrelated to her injuries, but it was apparently not because claimant was unable or unwilling to work. Although she was taking off work to have surgery for a work-related injury, the termination was for an alleged violation of respondent's policy concerning to whom the off-work notice should be given.

However, effective July 1, 2005, the Kansas Legislature modified the court made rules for determining date of accident for repetitive trauma injuries. K.S.A. 2005 Supp. 44-508(d) now reads:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

It is an undecided question as to how this statute is to be applied in situations such as here, where the series of accidents begins before July 1, 2005, and continues beyond that effective date of the statute.

Respondent correctly points out that

> the notice must be sufficient to "afford the employer an opportunity to investigate the accident and to furnish prompt medical treatment." *See Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 848-49 (1997). As stated in *Wilson v. Roseburg Forest Products*, 833 P.2d 1362, 1364 (Or. App. 1992):
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> > If an employer is aware that a worker has an injury without having any knowledge of how it occurred in relation to the employment,

> there is no reason for the employer to investigate or to meet its responsibilities under the Workers' Compensation Act. Actual knowledge by the employer need not include detailed elements of the occurrence necessary to determine coverage under the act. However, knowledge of the injury should include enough facts as to leave a reasonable employer to conclude that workers' compensation liability is a possibility and that further investigation is appropriate.[5]

It is apparent that claimant was aware that her work activities were either causing or contributing to her condition in her left thumb because she said so to Dr. Eyster. "The patient thought it was probably brought on by truck driving and the constant irritation in the thumb region."[6] Claimant testified that she also related this to her supervisors, Mr. Pulliam, and Mr. Colvard. Mr. Pulliam said he had never encountered carpal tunnel or trigger finger conditions before. He was unfamiliar with the concept of repetitive use injuries. This was apparently the reason he did not prepare an accident report, send claimant to the company physician, or otherwise follow the proper protocol for a work-related injury. Nevertheless, he was aware that there was the possibility of workers compensation liability and the potential that the claimant's work could further aggravate or contribute to her condition. He told her that she should "get it taken care of . . . to prevent any further injury or any problem by the company."[7] Accordingly, Mr. Pulliam was given notice that was sufficient to afford respondent an opportunity to investigate the accident and furnish prompt medical treatment. The July 1, 2005, amendment to K.S.A. 44-508 may result in claimant having suffered more than one series of accidents, but for purposes of preliminary hearing, as the series of accidents was ongoing, notice was timely.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 23, 2006, is reversed and the claim is remanded to the ALJ for further consideration and orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this _____ day of September, 2006.

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[5] Respondent and Insurance Carrier's Brief on Appeal, filed July 27, 2006, at 5. See also *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[6] P.H. Trans. (Mar. 16, 2006) at 34.

[7] *Id.* at 52.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier